

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

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|--------------|---|---------------------------|-----------------------|
| Appl. No.    | : | 10/750,517                | Confirmation No. 9240 |
| Applicants   | : | Michael G. Lisanke et al. |                       |
| Filed        | : | December 31, 2003         |                       |
| TC/A.U.      | : | 2439                      |                       |
| Examiner     | : | Harris C. Wang            |                       |
| Docket No.   | : | SOM920030007US1           |                       |
| Customer No. | : | 78007                     |                       |

Board of Patent Appeals and Interferences  
Commissioner for Patents  
P.O.Box 1450  
Alexandria, VA 22313-1450

APPELLANT'S REPLY BRIEF

Commissioner for Patents  
P.O. Box 1450  
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Sir:

In response to the Examiner's Answer dated March 19, 2009, the two month due date for response to which is May 19, 2009, Appellant hereby respectfully submits his reply brief in support of his appeal to the Board of Patent Appeals and Interferences of the Examiner's final rejection of claims 1-22 of the above-referenced application.

## RESPONSE TO EXAMINER'S ANSWER

### THE INDEPENDENT CLAIMS ARE PATENTABLE OVER CIRCENIS AND OpenPGP

The Examiner has taken the position that independent claims 1-22 are unpatentable over Circenis (U.S. Pre-Grant Publication No. 2004/0054908) in view the OpenPGP standard and IBM Certification Study Guide AIX V4.5 System Administration (1999) (hereinafter referred to as IBM AIX). In response, the Appellant respectfully traverses this rejection, and submits that Circenis, the OpenPGP standard, and IBM AIX alone and/or in combination with each other do not teach or suggest all the elements and limitations of the claimed invention. Consequently, the claims on file are not taught or suggested by Circenis, the OpenPGP standard, and IBM AIX alone and/or in combination with each other, and the allowance of these claims is earnestly solicited.

The Appellant would like to thank the Examiner for withdrawing the rejection under 35 U.S.C. §112, first paragraph.

The Appellant would like to first point out that Circenis alone and/or in combination with OpenPGP and/or IBM AIX does not teach or suggest at least the following claim elements of the presently claimed invention:

a processor which monitors at least one instance of software execution, wherein the one instance is identified and selected by an end-user to be monitored by the processor, wherein the end-user is a user that initiates execution of the software at a system associated with the end-user, and wherein the processor creates a log entry with at least one set of data derived from the one instance of software execution in response to the one instance being identified and selected to be monitored, whereby the set of data is used to diagnose the software execution;

[...]

a log file of a relatively-fixed size which stores the log entry for the at least one set of data which has been encrypted, and wherein the log file includes the symmetric key which has been encrypted with the public key;

random data in the log file when it is originally created and which is replaced by log entries so that a size of the log file including log entries appears to be a substantially constant size;

[...]

The Examiner states the following in the Response To Argument section of the Examiner's Answer:

The Appellant argues "As expressly taught by Circenis, the sender is the data owner, whereas a user in the presently claimed invention is an end user or an IT professional. (pg. 13)."

The Examiner respectfully disagrees with the Appellants interpretation of Circenis. If the data owner is using the system to monitor, then the data owner can be considered an "end user."

The Appellant then argues "The data owner of Circenis configures an application to monitor every instance of an application use.. .The presently claimed invention, on the other hand, is only monitoring a specific instance of a software execution.(pg. 14)"

However the claim language recites the limitation "a processor which monitors at least one instance of software execution" not "a specific instance of software execution" as the Appellant is arguing.

Furthermore, even if choosing to monitor every instance at least encompasses monitoring a specific instance. The claim limitation "a processor which monitors at least one instance of software execution , wherein the one instance is identified and selected" does not preclude the identification and selection of other instances.

The Appellant respectfully disagrees with the Examiner. Even if the data owner happens to use the software at a later time, the data owner, now as an end user, is unable to select and identify at least one instance of software execution. The presently claimed invention states that an end user is a user that initiates execution of the software at a system associated with the end user. When the data owner is creating the software, the data owner configures an application to monitor every instance of an application use. When the data owner is configuring the application to monitor each and every use of the application the data owner is not "**initiat[ing] execution of the software at a system associated with the end-user**". The term "**the software**" is referring back to the software that has had at least one instance of execution identified and selected by the end user to be monitored. Stated differently, the data owner is not an end user (i.e., a user executing the software) when the data owner is configuring the application monitor each user of the application. If the data owner ever becomes an end user, the data owner can merely execute the application which has already been

configured to monitor every use. Therefore, the data owner as an end user **cannot** identify and select at least one instance of software execution.

The claim language “wherein the one instance is identified and selected by an end-user to be monitored” inherently shows that the presently claimed invention is not automatically monitoring each and every use of an application as taught by *Circenis*. The end user in the presently claimed invention is required to affirmatively select and identify an instance of software execution to be monitored (i.e. “wherein the one instance is identified and selected by an end-user to be monitored”), as compared to having no control (which is the intention of *Circenis* since *Circenis* is trying to detect user tampering) over the monitoring of software execution as taught by *Circenis*. As can be seen, the claim language differs from arbitrarily monitoring every instance of software execution by reciting that the instance identified and selected by a user to be monitored is the instance that is monitored by the processor. Accordingly, the presently claimed invention distinguishes over *Circenis* for at least these reasons.

Additionally, claim 1 also recites “...whereby the set of data is used to diagnose the software execution...” The Appellant is unsure of how the Examiner concluded in the Final Office Action that *Circenis* teaches this element. *Circenis* records metrics for pay-per-use data and/or DRM usage data. Nowhere does *Circenis* teach that this data is used to diagnose the software execution. Accordingly, the presently claimed invention distinguishes over *Circenis* for at least this reason as well.

The Examiner also states the following in the Response To Argument section of the Examiner’s Answer:

The Appellant argues that "it is not customary to insert random data into log files....fixed size files do not have to be initialized with random data (pg. 16)."

The Examiner agrees that the "combined references of *Circenis* and IBM do not explicitly teach where random data in the log file when it is originally created (pg. 7 of Final Office Action)." However the Examiner maintains "it would have been obvious to one of ordinary skill in the art at the time of the invention to insert random data into a log file."

Placing random data into a file and is recognized as part of the ordinary capabilities of one skilled in the art. Therefore the Examiner considers the limitation

obvious because placing random data in a file would result in predictable results (i.e. data placed in a file)

The Appellant respectfully disagrees with the Examiner and contends that it is not customary to insert random data into log files, and therefore, not part of the ordinary capabilities of one skilled in the art. The Appellant, therefore, respectfully requests that the Examiner provide patents and/or publications or file an affidavit as is allowed under MPEP §707 to support the Examiner's use of Official Notice.<sup>1</sup>

The presently claimed invention is not merely placing random data within a file, but comprises "a log file of a relatively-fixed size which stores the log entry for the at least one set of data which has been encrypted, and wherein the log file includes the symmetric key which has been encrypted with the public key; random data in the log file when it is originally created and which is replaced by log entries so that a size of the log file including log entries appears to be a substantially constant size;".

Fixed-size files do not have to be initialized with random data. A fixed-sized file such as that taught by IBM AIX can be defined as a file that cannot exceed a certain size. For example, if the file is fixed at 100 bytes, the file can comprise any number of bytes from 0 to 100, but not exceed 100 bytes. The presently claimed invention, on the other hand, inserts random data into the log file at its creation so that the log file appears to be a substantially constant size no matter how many log entries are in the log file.

Accordingly, the Appellant asserts that it would not have been obvious to one of ordinary skill in the art at the time of the invention to insert random data into the log file when it is initially created. A circular file can have a maximum size associated with it and when this maximum size is reached, old

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<sup>1</sup> MPEP §2144.03 states "If the applicant traverses such an assertion the examiner should cite a reference in support of his or her position." If, however, the Examiner's statements are based on facts within the personal knowledge of the Examiner, the Applicants respectfully request that the Examiner support these references by filing an affidavit as is allowed under MPEP §707, citing 37 CFR 1.104(d)(2), and as specified in MPEP §2144.03. See, MPEP §2144.03, "When a rejection is based on facts within the personal knowledge of the examiner, the data should be stated as specifically as possible, and the facts must be supported, when called for by the applicant, by an affidavit from the examiner."

data is re-written, thereby creating a circular file. In fact, IBM AIX states that “the log file...is a cyclic file so, when its size gets to the maximum, it is overwritten”. This clearly shows that the circular file of IBM AIX is not populated with random data when it is generated, but is merely set to a maximum file size. In other words, the circular file of the IBM AIX is not populated with random data when it is generated to maintain a constant size, but is merely set to a maximum file size that can be reached.

Accordingly, the Appellant submits that the rejections of claims 1-22 under 35 U.S.C. §103(a) has been overcome and should be withdrawn.

### CONCLUSION

In view of the foregoing, it is respectfully submitted that the application and all of the pending claims are in condition for allowance. Reversal of the final rejection of claims 1-20 is respectfully requested.

Respectfully submitted,

Date: May 19, 2009

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